

Espinobarros v Penang Corp.

2007 NY Slip Op 31175(U)

May 7, 2007

Supreme Court, New York County

Docket Number: 0116289/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART _____

Justice

Index Number : 116289/2006
ESPINOBARROS, LEONARDO
vs
PENANG CORP.
Sequence Number : 001
ORDER MAINTAIN CLASS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

~~motion (s) and cross-motion(s)~~
decided in accordance with
the annexed decision/order
of even date.

FILED

MAY 14 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAY 07 2007


JUDITH J. GISCHE, J.S.C., J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
LEONARDO ESPINOBARROS, individually
and on behalf of all others similarly situated,

Plaintiffs,

-against-

PENANG CORP., PENANG CORP. d/b/a
NYONYA MALAYSIAN CUSINES, JUAN
LEE CHEAH, AND JUAN LEE CHEAH d/b/a
NYONYA MALAYSIAN CUISINE,

Defendants.
-----X

DECISION/ORDER

Index No.: 116289/06
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

FILED
MAY 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a], of the papers considered for review of
this/these motion(s):

Papers	Numbered
Pltf's motion [class cert] w/RJT affirm in support, exhs	1
Dft's affirm in opp (LL) w/exhs	2
Def's reply (RJT) w/exhs	3

Upon the foregoing papers the court's decision is as follows:

Plaintiff is an individual, allegedly employed by defendants, at least beginning in or about July 1997. He brings this action to recover the prevailing wages due to him. Plaintiff now moves for an order: (1) granting class certification to a class of individuals employed by the defendants below minimum wage or without overtime compensation, or both, within the six-year period proceeding the commencement of this action, pursuant to CPLR 901 and 902; (2) setting this matter down for a hearing to determine the manner of notice given to members of the proposed class, pursuant to CPLR 904; and (3) amending the caption to correct the name of defendant Juan Lee Cheah,

pursuant to CPLR 3025. Issue has been joined and this motion is timely. CPLR 902.

Background

Defendant Penang Corp. owns and operates at least one restaurant located at 240 Columbus Avenue in Manhattan. It is disputed whether Penang Corp. operates more than one restaurant. Plaintiff Leonardo Espinobarros ("Espinobarros") claims he was employed by the defendants at a restaurant they own located in New York City. He started employment in July 1997 as a dishwasher and was eventually promoted to the position of kitchen helper. Plaintiff does not identify the location of the restaurant he actually worked in. Plaintiff generally contends that defendants operate three restaurants in New York City, and additional restaurants in Massachusetts, Pennsylvania and Washington, D.C. It is also unclear whether Espinobarros continues to work for any named defendant.

Plaintiff alleges violations of the New York Labor Law and Fair Labor Standards Act of 1938. Specifically, throughout his employment with defendants, Espinobarros alleges that he worked more than twelve hours each shifts, was paid below minimum wage, did not receive overtime compensation and was not allowed to take meal or other breaks. Plaintiff argues that defendants took advantage of Espinobarros' "lack of facility with the English language, his status as an alien and his ignorance of his rights under the law."

Plaintiff states there are "numerous other workers employed by the defendants under similar conditions." Plaintiff further takes the position that defendants should be equitably estopped from asserting the statute of limitations as a bar to any portion of plaintiff's claims because they "concealed from [plaintiff] that they were entitled to earn

more by the minimum wage laws; failed to post the legally required minimum wage notices; and falsely told [plaintiff] that they were being paid the legal wage." This issue, however, is not ripe for consideration on this motion.

Plaintiff now moves for an order to determine whether this class action is to be so maintained. Plaintiff seeks to certify the following class description:

"All persons who worked for the defendants below minimum wage or without overtime compensation, or both, within the six-year period preceding the commencement of this action."

Plaintiff contends that they have met the requirements to maintain this class action. Specifically, plaintiff states that "there are in all likelihood scores or hundreds of members of the proposed plaintiff class" because "defendants have had numerous restaurants in the New York area and have employed dozens of workers over the years in each store." Plaintiff claims that joinder is impracticable because none of these workers have brought cases to date and suggests that these workers are intimidated in doing so given their immigration status. Plaintiff also argues that common issues of fact among the proposed plaintiffs, that plaintiff's claims are typical of the proposed class, that Espinobarros and his counsel will adequately represent the absent class members, and that a class action is the superior method of adjudicating the instant controversy.

Plaintiff also moves for an order to amend the caption to correct the first name of defendant Juan Lee Cheah in the caption so as to conform to the convention used by defendant to spell his name, to wit: Suan.

Only defendant Penang Corp. ("Penang Corp.") opposes the class certification on the grounds that there are few, if any other plaintiffs in such a proposed class because Penang Corp. owns and operates only one restaurant, located in New York

City. Penang Corp. also contends that Espinobarros cannot fairly and adequately represent the interest of the alleged class, since his interests are averse to other members of the alleged class.

Defendant Juan Lee Cheah ("Cheah") has not opposed the instant motion, which is cause for confusion in this record. Lawrence Lo, Esq. claims in this motion to only be counsel for defendant Penang Corp. However, Lo is counsel of record for all defendants, as he has appeared in this action and answered the complaint on behalf of all defendants. He will continue to be counsel of record until he is relieved by court order or by a valid substitution of counsel. Attorney Lo is hereby put on notice to correct the representation issues, if necessary.

Discussion

CPLR 901(a) sets forth the following prerequisites to maintain a class action:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

CPLR 902(a) provides, as follows, in pertinent part:

"The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have

been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. The impracticality or inefficiency of prosecuting or defending separate actions;
3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
5. The difficulties likely to be encountered by the management of a class action."

Plaintiff/movants bear the burden of establishing compliance with the requirements of both CPLR 901 and CPLR 902 and the determination as to whether to certify a class is ultimately vested within the sound discretion of the trial court.

Ackerman v Price-Waterhouse, 252 A.D.2d 179 (1st Dept. 1998). Plaintiff's failure to make a showing of any of the requisite elements for class certification will result in the denial of the motion for certification. Small v Lorillard Tobacco Co., Inc., 252 A.D.2d 1 (1st Dept. 1998).

Although New York's class action statute is to be liberally construed in favor of the maintenance of class actions, a court cannot grant class action certification where it is unwarranted on the law and facts of the case. Englade v Harper Collins Publishers, Inc., 289 A.D.2d 159 (1st Dept. 2001). With regard to the numerosity requirement, there is no "mechanical test" to determine whether this requirement has been met. Friar v. Vanguard Holding Corp., 78 A.D.2d 83 (2nd Dept. 1980). Nor is there a set rule for the

number of prospective class members which must exist before a class is certified. Id.

In support of his contention that the putative class consists of a critical mass of individuals which are sufficiently large to meet the numerosity requirement, plaintiff states there are "scores or hundreds" of other workers employed by the defendants "under similar conditions" at several restaurants in New York City and outside New York State in Boston, Massachusetts, Philadelphia, Pennsylvania, and Washington, D.C.

In opposition, Penang Corp. states that the number of workers similarly situated to plaintiff is less than ten and that Penang Corporation operates only one small Malaysian restaurant in New York City and no other restaurants.

Plaintiff's assertion, in reply, that "[o]ver the course of six years, in at least three locations, there were surely at least scores or hundreds of employees" artificially inflates the projected size of the class and offers no reliable indication of the true size of the putative class. Plaintiff has not provided an affidavit of fact and the complaint, verified by plaintiff's counsel, offers no indication as to who this proposed class might consist of. Plaintiff does not even indicate the number of people he worked with at any given time. While plaintiff is correct in that courts have certified classes with relatively small number, this is not the case here. In fact, plaintiff has only offered proof of one proposed member of this class action, Espinobarros himself. The court is unwilling to certify a class with only one proposed member absent sufficient proof as to the existence of additional members beyond mere hypothesis.

Further, plaintiff has come forward with a class description which is over broad in that it fails to account for plaintiff's theory of defendants liability. Plaintiff has claimed that defendants took advantage of the proposed class because they are "predominantly

foreign-born workers who do not speak English and because of their immigration status might feel intimidated in bringing a lawsuit on their own.”

Plaintiff's inability to provide any evidence of numerosity makes it impossible for the court to determine whether the plaintiff has affirmatively established the other elements of CPLR 901 and thus, whether a class action is superior to other methods of adjudicating the controversy. For example, plaintiff has failed to identify any other members of the putative class. The court is thereby unable to test whether plaintiff's claim is typical and whether plaintiff will fairly and adequately protect the interests of the class. Further, plaintiff has not demonstrated that joinder of all members would be impracticable, in the absence of class certification.

Moreover, in addition to failing to demonstrate numerosity, plaintiff's assertions, under CPLR 901(a) (2), that there are common questions of law and/or fact that predominate over questions affecting only individuals, is conclusory and unsupported. Plaintiff has offered no proof that other employees were paid below the New York State minimum wage and/or did not receive overtime pay. He does not seek to limit the class to New York State employees and makes allegations concerning workers in other states. A motion for class certification which is predicated on general, conclusory allegations should be denied. Dupack v Nationwide Leisure Corp., 70 A.D.2d 568 (1st Dept. 1979).

Accordingly, plaintiff's motion for class certification is hereby denied. The named plaintiff may continue to pursue his individual claim and the complaint is deemed amended so as to eliminate all allegations concerning the representation of absent persons.

Plaintiff's motion to amend the caption to correct the name of defendant Juan Lee Cheah to Suan Lee Cheah, pursuant to CPLR 3025, is hereby granted. The caption is deemed amended in accordance with this decision

All parties are directed to appear for a status conference on **June 14, 2007 at 9:30 a.m.** in Part 10, 80 Centre Street, Room 122.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for class certification is hereby denied; and it is further

ORDERED that the caption and complaint are hereby deemed amended so as to eliminate all allegations concerning the representation of absent persons; and it is further

ORDERED that plaintiff's motion to amend the caption to correct the name of defendant Juan Lee Cheah to Suan Lee Cheah is hereby granted; and it is further

ORDERED that all parties shall appear before the Hon. Judith J. Gische, on **June 14, 2007 at 9:30 a.m.**, in Part 10, 80 Centre Street, Room 122.

Any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 7, 2006

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
MAY 14 2007
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